No. 80-880

In the Supreme Court of the United States

OCTOBER TERM, 1980

CONTINENTAL OIL COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard in holding that petitioner had violated the general duty clause of the Occupational Safety and Health Act of 1970.

2. Whether the general duty clause, as interpreted and applied by the court of appeals, is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-9) is reported at 630 F. 2d 446. The decision of the Occupational Safety and Health Review Commission (Pet. App. 11-22) affirmed by the court of appeals is reported at 1978 Occup. Safety & Health Dec. (CCH) para. 22,903. The original decision of the Review Commission (Pet. App. 23-49) is reported at 1974-1975 Occup. Safety & Health Dec. (CCH) para. 19,717. The opinion of the Review Commission's administrative law judge (Pet. App. 50-94) is summarized at 1973-1974 Occup. Safety & Health Dec. (CCH) para. 16,413.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1980. A petition for rehearing was denied on November 4, 1980 (Pet. App. 10). The petition for a writ of certiorari was filed on November 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner operates a pipeline terminal facility in Chattanooga, Tennessee, where petroleum products are stored in tanks until loaded onto trucks for local distribution (Pet. App. 3). The petroleum products are piped to the tanks from a common carrier pipeline with a centralized dispatch facility near Atlanta, Georgia, and a local dispatch facility near petitioner's terminal facility (*ibid.*). On September 25, 1972, an explosion at petitioner's facility killed three persons (*id.* at 4).

At the time of the accident that resulted in this litigation, the terminal facility was operated by one employee, the terminal manager, who was required to be present at the facility to check the available capacity of the tanks before each pipeline delivery (Pet. App. 4). The manager could leave the terminal after the delivery had commenced, but he

was required to return before its scheduled completion (*ibid.*). The manager could stop the product flow by telephoning either the central or local dispatch facility, or by closing the manual valves at the terminal facility (*ibid.*). When the manager was absent from the terminal, the tanks were completely unattended, and the facility was not equipped with any automatic devices to detect tank overflows.

On September 25, 1972, a truck driver preparing to load his truck at the terminal facility discovered that gasoline was overflowing from one of the tanks (Pet. App. 4). The driver left the facility and notified the absent terminal manager that the gasoline was overflowing (*ibid.*). The manager immediately returned to the terminal area and attempted to stop the flow by manually closing the valves (*ibid.*). An explosion thereafter occurred, killing the manager and two other persons who were working in an adjacent plant (*ibid.*).

Based on an investigation by a compliance officer of the Occupational Safety and Health Administration, the Secretary of Labor issued various citations (see Pet. App. 24-25), including a citation which charged that petitioner had violated the "general duty clause" of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1),[1] by exposing its employees to the likelihood of serious physical harm resulting from hazards of fire and explosion caused by gasoline overflows (Pet. App. 4-5). The Secretary proposed that petitioner free the workplace of such hazards by using automatic detection devices and by maintaining the presence of personnel throughout the gasoline delivery process (*id.* at 5-6).

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[1]Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

The evidence at the administrative hearing demonstrated that fires resulting from overflowing petroleum storage tanks present a serious danger to employees and that an average of three and one-half lives are lost in each such fire (Pet. App. 13-14, 80). Some employers in the industry, including Exxon, employ automatic detection devices and require that personnel be present during delivery—the safety measures proposed by the Secretary—but other companies do not do so (*id.* at 15, 65-67, 84-86). The utility of these safety measures was recognized, however, both by witnesses who testified on behalf of the Secretary and by those who testified for the employer (*id.* at 9, 15).

Following the hearing, the administrative law judge vacated the citation on the ground that the evidence failed to establish that a majority of firms in the industry used the measures urged by the Secretary (Pet. App. 85-86, 89-90). The ALJ thus concluded that the measures were not "recognize[d]" as necessary in the industry and that the general duty clause therefore did not require their use (*id.* at 85-86).

On review, the Occupational Safety and Health Review Commission initially affirmed, by equally divided vote, the ALJ's disposition of the general duty clause citation (Pet. App. 34-35). The Secretary petitioned for review in the court of appeals, which remanded the case to the Commission for further consideration (*id.* at 4). On remand, the Commission found that petitioner had violated the general duty clause. The Commission held that industry knowledge must determine whether a hazard is recognized, but that industry practice does not limit the safety precautions that must be taken to abate a recognized hazard (*id.* at 14-15). The Commission found that the Secretary had met his evidentiary burden by proving that the overflow of gasoline from storage tanks is recognized as a hazard both by petitioner and by the industry as a whole, and that a manned delivery system and automatic detection devices are feasible

and reasonable means of preventing such spills (*id.* at 13-15). The Commission assessed a $500 penalty for the violation (*id.* at 16). The court of appeals affirmed.

ARGUMENT

1. Petitioner's principal contention (Pet. 8-13) is that the decision of the court below, holding that petitioner had violated the general duty clause of the Act (29 U.S.C. 654(a)(1)), conflicts with decisions of other courts of appeals which have found that a "reasonable man" test is implicit in the general duty clause of the Act, as well as in the Secretary's general safety standards, which require that an employer provide "necessary" or "appropriate" personal protective equipment in operations exposing employees to hazardous conditions. See 29 C.F.R. 1910.132(c); 29 C.F.R. 1926.28(a). The major premise of petitioner's contention, that the court of appeals did not employ a "reasonable man" test, is erroneous. The Sixth Circuit explicitly relied on its previous decision in *Ray Evers Welding Co.* v. *OSHRC*, 625 F. 2d 726, 731 (1980), in which it construed 29 C.F.R. 1926.28(a), a personal protective equipment standard, as requiring the employer to do that which would be done by "a reasonably prudent employer, concerned with the safety of his employees." Moreover, the court in *Ray Evers Welding Co.* v. *OSHRC, supra*, 625 F. 2d at 731, explicitly noted that its "holding is consistent with our decision in *Schriber Sheet Metal & Roofers, Inc.* v. *OSHRC*, 597 F. 2d 78 (6th Cir. 1979), adopting a similar test for compliance with the general duty clause (Section 5(a)(1) of the Act)."[2]

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[2]Although petitioner contends that the general duty clause would be unconstitutionally vague without a "reasonable man" test, it concedes (Pet. 23-27) that such a test would cure any possible constitutional infirmity. Because the Sixth Circuit applied that test here, there is no substance to petitioner's constitutional contention.

The decision of the court below is consistent with the decisions of other courts of appeals, not only with respect to the "reasonable man" test but also with respect to the overall analysis to be applied in these cases. To prove that an employer has violated the general duty clause by failing to "free" its workplace of a "recognized hazard,"[3] the courts have required the Secretary to show that the relevant industry, or the employer himself, recognizes a condition as hazardous and that the employer has failed to undertake safety measures that would be regarded as useful or feasible by a reasonably prudent employer or by a reasonably conscientious safety expert[4] familiar with the industry. *National Realty & Construction Co.* v. *OSHRC*, 489 F. 2d 1257, 1265-1267 (D.C. Cir. 1973); *General Dynamics Corp.* v. *OSHRC*, 599 F. 2d 453, 464 (1st Cir. 1979); *Brennan* v. *Smoke-Craft, Inc.*, 530 F. 2d 843, 845 (9th Cir. 1976). See also *Voegele Co.* v. *OSHRC*, 625 F. 2d 1075, 1078-1080 (3d Cir. 1980); *Bristol Steel & Iron Works, Inc.* v. *OSHRC*, 601 F. 2d 717, 722-723 (4th Cir. 1979).

The court below correctly applied this test here. First, the court affirmed the Commission's finding that petitioner had recognized the danger posed by overflowing storage tanks (Pet. App. 5-6, 13-14). Second, the court noted that " '[t]he question is whether a precaution is recognized by safety experts as feasible' " (*id.* at 8, quoting *National Realty &*

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[3]To establish a violation, the Secretary must also show that the hazard is "causing or * * * likely to cause death or serious physical harm" (Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1)). See, *e.g.*, *National Realty & Construction Co.* v. *OSHRC*, 489 F. 2d 1257, 1265 (D.C. Cir. 1973); *Illinois Power Co.* v. *OSHRC*, 632 F. 2d 25, 28 (7th Cir. 1980). Petitioner does not dispute that this aspect of the test is met here.

[4]The courts have apparently used these terms interchangeably to describe the same standard. See *General Dynamics Corp.* v. *OSHRC*, 599 F. 2d 453, 464 (1st Cir. 1979); *Magma Copper Corp.* v. *Marshall*, 608 F. 2d 373, 376-377 (9th Cir. 1979).

Construction Co. v. *OSHRC, supra,* 489 F. 2d at 1266 n.37) and held (Pet. App. 9) that the "safety utility," "feasibility and reasonableness" of the measures proposed by the Secretary were supported by substantial evidence, including evidence that these measures were used by other firms in the industry.

In the context of the personal protective equipment standards, as petitioner notes (Pet. 9-11), the Fifth Circuit has framed the "reasonable man" test in a form that is somewhat different from that used by other courts of appeals. Without exception, the courts of appeals have recognized that the customary practice of an industry constitutes relevant evidence of the precautions that a reasonably prudent employer would take. However, the Fifth Circuit alone[5] has gone so far as to suggest that industry practice "generally establishes" the extent of the employer's obligations in the absence of "compelling evidence" that the practice is unsafe. See *Cotter & Co.* v. *OSHRC*, 598 F. 2d 911, 913, 914 n.5 (5th Cir. 1979); *Power Plant Division* v. *OSHRC*, 590 F. 2d 1363, 1365 (5th Cir. 1979); *B & B Insulation, Inc.* v. *OSHRC*, 583 F. 2d 1364, 1370-1371 (5th Cir. 1978). Other courts that have considered the question have rejected the Fifth Circuit's emphasis on industry custom on the ground that " '[s]uch a standard would allow an entire industry to avoid liability by maintaining inadequate safety' " (*Voegele Co.* v. *OSHRC, supra*, 625 F. 2d at 1078,

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[5]Petitioner erroneously asserts (Pet. 11-12) that the Seventh and Tenth Circuits have adopted the Fifth Circuit's formulation of the "reasonable man" test. In *Marshall* v. *L.E. Myers Co.*, 589 F. 2d 270, 272 (1978), however, the Seventh Circuit held only that the Secretary had failed to prove that his proposed method was safer than the method already being used by the employer. Similarly, the basis for the Tenth Circuit's decision in *H-30, Inc.* v. *Marshall*, 597 F. 2d 234, 235 (1979), was that the Secretary had selected the wrong industry for purposes of demonstrating that the hazard at issue was "recognized."

quoting *General Dynamics Corp.* v. *OSHRC, supra*, 599 F. 2d at 464).[6]

For several reasons, this slight variation in the precise formulation of the "reasonable man" test does not warrant review. First, whatever difference exists is an extremely narrow one, which amounts only to a slight variation in emphasis. The Fifth Circuit has not held that industry practice is conclusive, but only that it "generally" establishes the extent of the employer's obligations. The practical distinction between this formulation and that of the other courts of appeals is not yet certain. Several cases that were argued in the Fifth Circuit on October 27, 1980, and are now awaiting decision, may clarify the extent of the actual conflict, if any. See *Owens-Corning Fiberglas Corp.* v. *Marshall*, No. 79-2516; *Power Plant Div., Brown & Root, Inc.* v. *OSHRC*, No. 79-3677; *S & H Riggers & Erectors, Inc.* v. *OSHRC*, Nos. 79-2358, 80-7297; *Standard Roofing & Sheet Metal, Inc.* v. *OSHRC*, No. 79-3319. Accordingly, further development of the issue in the courts of appeals is appropriate.

Second, the Fifth Circuit developed its industry practice test in cases involving personal protective equipment standards. To date, the court has not clearly applied the test to the general duty clause itself, which is the provision at issue here.[7] Thus, any existing conflict is indirect at best.

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[6]Accord: *National Realty & Construction Co.* v. *OSHRC, supra*, 489 F. 2d at 1266 n.37 *Bristol Steel & Iron Works, Inc.* v. *OSHRC, supra*, 601 F. 2d at 723; *Ray Evers Welding Co.* v. *OSHRC, supra*, 625 F. 2d at 730, 731-732.

[7]Indeed, in cases arising under the general duty clause, the Fifth Circuit has generally applied the test enunciated by the District of Columbia Circuit in *National Realty & Construction Co., supra*, as the Sixth Circuit did here. See *Georgia Electric Co.* v. *Marshall*, 595 F. 2d 309 (5th Cir. 1979); *Getty Oil Co.* v. *OSHRC*, 530 F. 2d 1143 (5th Cir. 1976). However, the Fifth Circuit, in a case involving the general duty

Third, the result reached in this case would not have been different under the Fifth Circuit's formulation in any event. The Fifth Circuit has declined to uphold citations where, "in an industry of multiple employers, not one of them would have followed [the Secretary's proposed] course of action" (*B & B Insulation, Inc.* v. *OSHRC, supra*, 583 F. 2d at 1370), or where the Secretary introduced no evidence of customary industry practice (*Power Plant Division* v. *OSHRC, supra*, 590 F. 2d at 1365). In this case, however, the record shows that while not every company in the industry uses automatic detection devices and completely manned deliveries—the safety measures proposed by the Secretary—some companies, including Exxon, the industry leader, do employ these measures. Moreover, petitioner does not challenge the Commission's findings, which were affirmed by the court of appeals (Pet. App. 9), that these measures constitute a feasible and useful means of reducing the extremely serious hazards associated with spilled petroleum products.

Finally, all courts that have considered the question agree that it is unnecessary to determine whether some hypothetical "reasonable man" would have recognized the danger if

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clause, recently cited its decision in *B & B Insulation, Inc.* v. *OSHRC, supra*, where it first stated the industry practice test. See *R.L. Sanders Roofing Co.* v. *OSHRC*, 620 F. 2d 97 (5th Cir. 1980). In *Sanders*, the court held that the employer had not violated the general duty clause by failing to install a guardrail around a flat roof on which roofers were working. The court relied primarily on the fact that a specific standard promulgated under the Act requires guardrails on roofs only where the slope exceeds four inches in twelve (*id.* at 99). The court further stated that falling from a flat roof was not recognized as a hazard in the roofing industry, and cited *B & B Insulation, Inc., supra*, in support of the proposition that the Secretary should promulgate a specific standard requiring guardrails if, industry practice notwithstanding, he believed that they are necessary (*id.* at 100-101). The *Sanders* court was concerned because the fall hazard was not one that was recognized; it did not rule on the test for determining the safety measures required where, as here, the industry does recognize the existence of a hazard.

an employer has actual knowledge of a hazardous condition requiring preventive measures. See *Cotter & Co.* v. *OSHRC*, 598 F. 2d 911, 914 (5th Cir. 1979); *Cape & Vineyard Division* v. *OSHRC*, 512 F. 2d 1148, 1152 (1st Cir. 1975); *Brennan* v. *OSHRC*, 494 F. 2d 460, 463-464 (8th Cir. 1974). The record here contains substantial evidence that petitioner had such actual knowledge.

The Commission found that petitioner recognized that the explosive vapors that are released by gasoline overflowing from a storage tank posed a danger to its employees (Pet. App. 13). Petitioner was "well aware of the circumstances surrounding * * * [an] explosion [and fatality at a nearby storage tank] and knew that the neighboring storage tank farm, like its own, followed a procedure called 'unmanned delivery' in filling its tanks" (*id.* at 14). The Commission also noted that petitioner's own witness recognized the safety utility of high level alarms used in conjunction with manned delivery (*id.* at 15). Thus, petitioner actually knew of the potential danger on its premises, the inadequacy of unmanned delivery in avoiding tank overflows, and the existence of a materially safer method of conducting its business. In these circumstances, it is clear that petitioner violated its obligation under the general duty clause of the Act, and any difference in approach among the circuits is immaterial.

2. Petitioner also contends (Pet. 27-29) that the decision below conflicts with this Court's ruling in *Industrial Union Department* v. *American Petroleum Institute* ("*Benzene*"), No. 78-911 (July 2, 1980), because the decision imposes safety obligations on employers limited only by the constraint of feasibility. In *Benzene*, a plurality of the Court held that, before the Secretary may promulgate a permanent occupational safety and health standard under Section 6(b) of the Act, 29 U.S.C. 655(b), he must make a threshold

finding that the hazard addressed by the standard currently poses a "significant risk" to safety or health that the new standard would reduce (slip op. 28-32).

Petitioner's reliance on *Benzene* is misplaced because Section 5(a)(1) of the Act, which is at issue here, does not incorporate the definitional provision of Section 3(8), 29 U.S.C. 652(8), which was involved in *Benzene*. At all events, the Sixth Circuit's construction of the general duty clause does not require the employer to do everything feasible to protect against every risk to his employees' safety and health. On the contrary, Section 5(a)(1) includes the same type of threshold determination of significant risk that the *Benzene* plurality required for the issuance of permanent standards under Section 6(b). Section 5(a)(1) requires an employer to free his workplace only of "recognized hazards" that are "causing or are likely to cause death or serious physical harm to his employees." In the instant case, the ALJ noted that there are an average of three and one-half deaths for every fire caused by overflowing storage tanks (Pet. App. 85), and the court of appeals determined that the safety precautions proposed by the Secretary were a reasonable and useful means of reducing this substantial safety hazard (*id.* at 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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